IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 10, 2004 Session

ROBERT BEAN ET AL. v. PHIL BREDESEN ET AL.

Appeal from the Chancery Court for Davidson County
No. 91-2558-I Irvin H. Kilcrease, Jr., Chancellor

No. M2003-01665-COA-R3-CV - Filed June 2, 2005

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

OPINION DENYING PETITION FOR REHEARING

The parties challenging the constitutionality of Tenn. Code Ann. § 70-4-403(4)(B) (2004) have filed a petition for rehearing pursuant to Tenn. R. App. P. 39 requesting this court to reconsider portions of its May 2, 2005 opinion. The petition asserts that we have ignored material facts[1] and misunderstood the statutes and rules relating to cervidae in Tennessee.[2] We have carefully considered the points raised in the petition and have determined that the petition raises no new factual or legal matters that we have not already considered.

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[1]Several of the ten factual matters the petitioners believe we overlooked in our May 2, 2005 opinion are not supported by the record. For example, the petition for rehearing asserts that there are fifty "deer" farms in Tennessee. However, the testimony was that there are fifty "cervid" farms in Tennessee. The family Cervidae includes deer, raindeer, moose, elk, and caribou, as well as other animals. There is nothing in the record suggesting that all the owners of the cervid farms in Tennessee currently possess or desire to possess white-tailed deer. Similarly, the petition asserts that we overlooked Dr. Robert Randel's testimony regarding the economic value of raising white-tailed deer. However, Dr. Randel's testimony related to the practice in Texas of releasing genetically superior farm-raised deer into the wild for "trophy hunts." There is no evidence in this record that any of the parties challenging Tenn. Code Ann. § 70-4-403(4)(B) planned to release farm-raised deer into the wild or to offer "trophy hunts." Finally, the petition asserts that we overlooked the relevance of Dr. Gary Kreeger's testimony regarding the incidence of CWD in Wyoming, despite the fact that Wyoming has no deer farms and does not allow the importation of deer or elk. Dr. Kreeger did not testify that Wyoming has no deer farms or that Wyoming does not permit the importation of deer or elk. To the contrary, Dr. Kreeger illustrated his assertion that captivity exacerbates the spread of CWD by referring to "fenced" white-tailed deer in Wyoming.

[2]Several of the assertions about the operation of Tennessee's statutes are likewise mistaken. For example, the persons challenging the constitutionality of Tenn. Code Ann. § 70-4-403(4)(B) assert that we did not consider that "the T.W.R.A. permits private persons in Tenn[essee] to retain white-tailed deer on their property by fencing them in." Tennessee's statutes do not permit private persons to build fenced enclosures and to place white-tailed deer in these enclosures. The testimony relied upon by the petitioners was to the effect that property owners have not violated the law if they inadvertantly fence in deer while fencing their property.

The arguments in the petition for rehearing reflect a fundamental misunderstanding regarding the courts' responsibilities when called upon to interpret statutes and to pass upon their constitutionality and the relationship between the statutes administered by the TWRA and the regulations promulgated by the Tennessee Department of Agriculture. Accordingly, we have prepared this opinion to expand on the legal basis for the conclusion in our May 2, 2005 opinion that Tenn. Code Ann. § 70-4-403(4)(B) does not place an undue burden on interstate commerce.

I.

The role of the courts when called upon to construe statutes is to ascertain and to give the fullest possible effect to the Tennessee General Assembly's intention and purpose. *Boarman v. Jaynes*, 109 S.W.3d 286, 290 (Tenn. 2003). Our goal is to construe statutes, especially statutes relating to the same subject matter, in a way that avoids conflict and facilitates the harmonious operation of the law. *In re Akins*, 87 S.W.3d 488, 493 (Tenn. 2002); *Frazier v. East Tenn. Baptist Hosp.*, 55 S.W.3d 925, 928-29 (Tenn. 2001). Accordingly, one of the principal canons of statutory construction is that statutes addressing the same subject matter or sharing a common purpose should be construed in pari materia, that is, they should be construed in light of all other statutes dealing with the same subject. *Frye v. Blue Ridge Neuroscience Ctr.*, 70 S.W.3d 710, 716 (Tenn. 2002); *State v. Adams*, 24 S.W.3d 289, 295 (Tenn. 2000).

Both Tenn. Code Ann. § 70-4-403(4)(B) and the Department of Agriculture's regulations[3] are intended to protect Tennessee's indigenous white-tailed deer population. The statutory ban on the private possession of white-tailed deer in Tenn. Code Ann. § 70-4-403(4)(B) was enacted first, and the Department's regulations followed. Rather than undermining the effectiveness of Tenn. Code Ann. § 70-4-403(4)(B), the Department's regulations complement it. These regulations work to screen imported mule deer and elk, the only other CWD-susceptible cervids, to minimize the risk that they are carrying the disease into Tennessee, thereby reducing the risk of spreading the disease to indigenous white-tailed deer.[4]

II.

The persons challenging the constitutionality of Tenn. Code Ann. § 70-4-403(4)(B) insist that any burden the statute places on interstate commerce is undue because the statute, as a practical matter, provides no local benefit. Using the balancing process in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), they assert that a state regulatory program that provides no local benefit should be found to violate the Commerce Clause if it places even the slightest burden on interstate commerce. We disagree with the challengers' assertion that Tenn. Code Ann. § 70-4-403(4)(B) provides no local benefit.

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[3]Tenn. Comp. R. & Regs. 0080-2-1-.12(3)(a), (b), (c).

[4]Our May 2, 2005 opinion discusses the State's justification for treating elk and mule deer differently from white-tailed deer. Accordingly, we need not plough this ground again.

The challengers argue that Tennessee's statutory ban on the private possession of white-tailed deer provides no local benefit because it will not prevent the spread of CWD to indigenous white-tailed deer. They assert that statute will eventually prove to be ineffective because it overlooks the possibility that Tennessee's indigenous white-tailed deer could be infected by migrating cervids that have contracted CWD. While it is true that Tennessee has chosen not to attempt to control indigenous or migrating CWD-susceptible animals, we do not find this regulatory choice to be constitutionally suspect.

Within constitutional confines, the executive and legislative branches of government enjoy broad discretion in determining the most appropriate means to address public health, safety, and welfare concerns. The government's decision not to attempt to control wild indigenous or migrating CWD-susceptible cervids is not without justification for two reasons. The first reason is the difficulty and expense of developing effective prevention programs for wild CWD-susceptible cervids. The second reason is the clear evidence that Tennessee's indigenous white-tailed deer face a far greater risk of contracting CWD from farm raised CWD-susceptible cervids than they do from wild or migrating cervids.[5]

The Commerce Clause does not require state regulatory programs to be perfect. States may do what they can to lessen or minimize risks to public health, safety, and welfare. The record in this case supports the government's decision to concentrate its efforts on imported farm-raised white-tailed deer rather than diluting its efforts by also attempting to regulate deer in the wild. Thus, we adhere to the conclusions in our May 2, 2005 opinion (1) that Tennessee has a significant interest in protecting its indigenous white-tailed deer, (2) that Tenn. Code Ann. § 70-4-403(4)(B) lessens, but does not eliminate, the possibility that Tennessee's indigenous white-tailed deer will contract CWD, and (3) that the benefits flowing from lessening the risk of the spread of CWD to Tennessee's indigenous white-tailed deer far outweigh the effects on interstate commerce proven in this record.

III.

After reviewing the record in light of the matters raised in the petition for rehearing, we have determined that our May 2, 2005 opinion fully and fairly addresses all the issues raised by the persons challenging the constitutionality of Tenn. Code Ann. § 70-4-403(4)(B). Accordingly, the petition for rehearing is denied with the costs taxed, jointly and severally, to Robert Bean, Frank Shaffer, David Autrey, and Mack Roberts for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.

[5] The record contains no evidence that wild white-tailed deer in Tennessee or any of the contiguous states have contracted CWD. In addition, there is no evidence that white-tailed deer from CWD infected states could migrate far enough to reach Tennessee or evidence of the migration range of an animal infected with CWD. However, the record contains evidence that wild CWD infected deer tend to be concentrated within five to ten miles of deer farms where CWD is present.